IN THE

Supreme Court of the United States

October Term, 1974

No. 74-418

EDWIN DUBA,

Petitioner,

vs.

W. DON McINTYRE, DONALD LISSMAN and BERNARD J. ACH

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT W. DON McINTYRE IN OPPOSITION

OPINIONS BELOW

I. United States District Court for the District of Nebraska, Honorable Richard E. Robinson, District Judge; Unreported opinion reproduced in the Appendix of Petitioner's Brief.

II. *Edwin Duba v. W. Don McIntyre, Donald Lissman and Bernard J. Ach,* No. 73-1724, Decided July 18, 1974 (8 Cir. 1974); Opinion reproduced in the Appendix of Petitioner's Brief.

JURISDICTION

On the 4th day of May, 1973, the United States District Court for the District of Nebraska, Honorable Richard E. Robinson, Judge, entered an Order granting defendant W. Don McIntyre's Motion For Summary Judgment and dismissed this action against said defendant.

On the 8th day of August, 1973, the United States District Court for the District of Nebraska, Honorable Richard E. Robinson, Judge, entered an Order denying Petitioner's Motion for New Trial.

On the 18th day of July, 1974 the United States Court of Appeals for the Eighth Circuit, in a per curiam opinion, affirmed the decision of the United States District Court for the District of Nebraska.

Respondent herein specifically notes that Petitioner has failed to state any basis for conferring on this Court jurisdiction to review the lower court judgment. Therefore, Respondent objects to the jurisdiction of this Court to further consider the Petitioner's Petition for Writ of Certiorari.

QUESTION PRESENTED

Whether a Justice of the Peace in Nebraska is protected by the common law doctrine of judicial immunity where a suit for a money judgment is brought against him in the United States District Court for the District of Nebraska pursuant to 42 U. S. C., § 1983 as a result of the Justice's issuance of a Bench Warrant and an Order For Attachment In Aid And Execution to effectuate the collection of a legally imposed fine which remained unpaid.

STATUTE CITED

"Every person who, under color of any state, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

17 Stat. 13, 42 U. S. C., § 1983.

STATEMENT OF THE CASE

This action was brought in the United States District Court for the District of Nebraska by Edwin Duba, against Justice of the Peace W. Don McIntyre, Chief of Police Donald Lissman, and City Attorney Bernard J. Ach. The action was brought pursuant to 42 U. S. C., § 1983. The petitioner alleged he had suffered damages as a result of malicious prosecution, false arrest, and violation of his civil rights by the respondents. Respondent W. Don McIntyre answered alleging, among others, the defense of judicial immunity. Thereafter Justice of the Peace McIntyre filed a Motion for Summary Judgment alleging the action should be dismissed against him, as no genuine issue as to any material fact existed and that he was entitled to a judgment as a matter of law. Hearing was had on respondent W. Don McIntyre's Motion for Summary Judgment and the Motion was sustained and the case dismissed by the Honorable Richard E. Robinson. Both remaining respondents filed Motions For Summary Judgment which also were sustained. From that decision Petitioner appealed to the United States Court of Appeals for the Eighth Circuit. On July 18, 1974 that court in a per curiam opinion affirmed the United States District Court for the District of Nebraska.

The undisputed facts disclose that on September 11, 1970 the petitioner appeared before respondent McIntyre, a duly elected, qualified and acting justice of the peace for the District of Saline County, Friend, Nebraska. The petitioner entered a plea of guilty to a charge of unlawfully permitting hogs to run at large upon the city streets, alleys, and public grounds of Friend, Nebraska in violation of an ordinance of the City of Friend. As a result of the violation, petitioner Edwin Duba was fined $55.00, together with costs in the sum of $4.00. Petitioner was then released upon the condition that said fine and costs would be paid within one week.

Thirteen days later, on September 24, 1970, petitioner still had not paid the earlier imposed fine. Therefore, on the 24th day of September, respondent Bernard J. Ach, the duly appointed and acting City Attorney of Friend, Nebraska, signed, executed and delivered an Affidavit for Bench Warrant to respondent W. Don McIntyre, the duly elected, qualified and acting Justice of the Peace for the District of Saline County, Friend, Nebraska.

On September 24, 1970 respondent W. Don McIntyre issued both a Bench Warrant and an Order For Attachment In Aid And Execution and delivered the same to respondent Donald Lissman, the qualified, appointed, and acting Chief of Police of Friend, Nebraska. The Bench Warrant commanded the Police Chief "to take the said Edwin Duba into custody and bring his body before me for entry of an Order of Attachment . . .". The expressed purpose of the Bench Warrant was to aid in the collection of the fine. As suggested in Judge Robinson's Memorandum, "It is clear from the language of the Bench Warrant that the purpose was to aid in the execution and attachment and not to commit the petitioner to jail until

the fine and costs were paid, and the petitioner's own evidence confirms that the purpose was not to commit the petitioner to jail until the fine and costs were paid."

On September 24, 1970, respondent Donald Lissman placed the plaintiff in jail for one to two hours. On that same date 110 hogs in which petitioner had an interest were attached. On September 25, 1970 these hogs were sold at public auction in York, Nebraska in respondent McIntyre's name without bond, inventory, or advertisement. The petitioner's unpaid fines were satisfied out of the proceeds of the sale and the remainder of the money was delivered to the rightful owner of the hogs.

ARGUMENT

The United States Court of Appeals for the Eighth Circuit in a per curiam opinion found that Justice of the Peace W. Don McIntyre acted within his general powers under Nebraska law. The evidence introduced in support of this respondent's Motion For Summary Judgment clearly supported a finding that the Justice of the Peace was acting within the scope of his general jurisdiction. The appellate court further held that in these actions the respondent was protected from civil liability by the common law doctrine of judicial immunity. This immunity was not abrogated by the passage of 42 U. S. C., § 1983. The Circuit Court opinion is manifestly correct when viewed in light of all precedent dealing with this question.

As recently as 1967 this Court dealt with the issue of the applicability of the doctrine of judicial immunity. In *Pierson v. Ray*, 386 U. S. 547 (1967), certiorari was granted to consider whether a local judge was liable for

damage under 42 U. S. C., § 1983 for an unconstitutional conviction. The decision was firm and clear.

> . . . Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine in Bradley v. Fisher, 13 Wall. 335, 20 L. Ed. 646 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' (Scott v. Stansfield, L. R. 3 Ex. 220, 223 (1868), quoted in Bradley v. Fisher, supra, 349, note, at 350). It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.
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> We do not believe that this settled principle of law was abolished by § 1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. *Id.* at 553-54.

Petitioner does not assert that there is a conflict of decisions, nor in light of the clarity of the *Pierson* decision, could there be any substantial conflict. It is submitted that there are a host of lower court decisions, including this case, wherein the doctrine of judicial immunity has been correctly applied.

There is no substantial need for review of the issues raised by appellant. These same issues have been decided and those decisions applied since the common law of England. The soundness of those earlier decisions was reviewed and reaffirmed by this Court in *Pierson v. Ray*, supra.

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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DATED: November 6, 1974

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